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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/629,991	07/30/2003	Cheree L. B. Stevens	ADV12 P-305D	3726

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EXAMINER

MAHAFKEY, KELLY J

ART UNIT	PAPER NUMBER
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1761

MAIL DATE	DELIVERY MODE
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06/04/2007

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/629,991

Applicant(s)

STEVENS ET AL.

Examiner

Kelly Mahafkey

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 20 March 2007.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-23 and 35-42 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-23 and 35-42 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____.

DETAILED ACTION

Amendments made 3/20/07 have been entered.
Claims 1-23 and 35-42 remain pending.

Continued Examination Under 37 CFR 1.114

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 3/20/07 has been entered.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

The previous 102(b) rejection of claim 1 over Earle et al. (US 45045032) has been withdrawn in light of applicant's amendments and arguments made 3/20/07. Specifically, the rejection has been withdrawn due to the new limitation and arguments concerning the substrate as a pastry product comprising wheat flour.

Claims 1-11, 14-20, 22, 23, 35 and 41 are rejected under 35 U.S.C. 102(e) as being anticipated by Roskam et al. (US 2003/0044488 A1)

The applied reference has common inventors with the instant application. Based upon the earlier effective U.S. filing date of the reference, it constitutes prior art under 35 U.S.C. 102(e). This rejection under 35 U.S.C. 102(e) might be overcome either by a

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showing under 37 CFR 1.132 that any invention disclosed but not claimed in the reference was derived from the inventors of this application and is thus not the invention "by another," or by an appropriate showing under 37 CFR 1.131.

Roskam teaches of a composition comprising a pastry product at least partially coated with a substantially clear (i.e. transparent) coating composition comprises a oxidized wheat starch component (i.e. a modified starch component) wherein the coating composition provides at least a partial moisture barrier on the pastry product, wherein the pastry product comprises wheat flour. Roskam teaches that the pick up for the coating composition is applied as slurry, and that the slurry composition includes 32-48% solids. Roskam teaches that the coating composition includes 4-20% dextrin (i.e. a film former), 0.1-0.3% stabilizers including xanthan gum, 11% sugar, and 0.1-3% leavening agents comprising 0.1-3% sodium acid pyrophosphate and/or 0.1-3% sodium bicarbonate. Roskam teaches that the slurry composition pick up can vary depending on the substrate material. Roskam teaches that the slurry pickup is 25-35% for baked goods. Roskam teaches that the slurry composition has a Strain viscosity of about 4-20 seconds. Specifically regarding the coating composition as applied at a temperature from about 40-100F, Roskam teaches of applying the coating to a substrate without additional heating or cooling, thus it would be inherent that Roskam teaches of applying the coating at about 70F (i.e. room temperature). Refer specifically to Abstract, Paragraphs 0002, 0013-0015, 0020-0023, 0026-0028, 0034-0036, and 0040-0044.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

The previous 103(a) rejections have been withdrawn in light of applicant's amendments and arguments made 3/20/07. Specifically, the rejections have been withdrawn due to the new limitation and arguments concerning the substrate as a pastry product comprising wheat flour.

Claims 12, 13, 21, 36, 37, and 38 are rejected under 35 U.S.C. 103(a) as being unpatentable over Roskam, in view of Lenchin et al (US 4510166).

Roskam teaches of a pastry product with a substantially clear partial moisture barrier coating containing dextrin, as discussed above. Roskam, however, is silent to the type of dextrin in the coating composition as recited in claims 12, 13, 21, 36, and 38, and to up to about 32% dextrin as recited in claim 38.

Regarding the dextrin as corn dextrin that is low solubility of less than about 15% in 77F water, Lenchin teaches that corn dextrin provides is a suitable type of dextrin to use when producing coating compositions (Abstract and Column 4 lines 53-54). Roskam teaches that dextrin is utilized to modify the texture and tensile of the final coated product (paragraphs 0034 and 0035). Since Roskam teaches of using a dextrin in a coating composition, does not teach what type of dextrin to utilize, one would have been motivated to look to the coating art, such as Lenchin, to determine what type of dextrin to utilize in the coating. One would have been motivated to use corn dextrin as the dextrin coating as taught by Roskam because Lenchin teaches that corn dextrin is a suitable type of dextrin to use in coating compositions. One would have been further motivated to chose a solubility level corn dextrin depending on the desired texture and tensile strength of the final product.

Regarding up to about 32% dextrin as recited in claim 38 Roskam teaches, in one embodiment that up to 20% dextrin is utilized in the coating composition. Roskam teaches that more dextrin is utilized if a crunchier texture and reduce breakage (i.e. increased tensile strength) is desirable (paragraphs 0034 and 0035). Thus, depending on the thickness of the pastry product and the desired crunchiness of the pastry, one of ordinary skill in the art at the time the invention was made would have been motivated to modify the amount of dextrin in the coating composition. One of ordinary skill in the art at the time the invention was made would have been further motivated to increase the amount of dextrin in the coating composition in order to produce a crunchier pastry product that was stronger (i.e. do not break easily, such as during transportation).

Claims 39, 40, and 42 are rejected under 35 U.S.C. 103(a) as being unpatentable over Roskam, in view of Fennema ed. (Food Chemistry 3rd Edition).

Roskam teaches of a pastry product with a substantially clear partial moisture barrier coating containing modified food starch, as discussed above. Roskam, however, is silent to the substitution level of the modified food starch as recited in claims 39 and 40. Fennema teaches that modified starch usually has a substitution level of less than 0.1 and generally within the range of 0.002-0.2 (Page 201 Section 4.4.9 Paragraph 3). Since, Roskam does teaches of a modified starch but does not teach of the substitution level of the starch, one of ordinary skill in the art would have been motivated to look to the food art, such as Fennema, to find the starch substitution level. One would have been further motivated to use starch with a substitution level of 0.002-0.2 since it was commonly utilized in foods and would be readily available.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory

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double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-23 and 35-42 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 5-9, 11, 14, 15, and 17-19 of copending Application No. 10682673 (673). The references and rejection are incorporated herein and as cited in the office action mailed January 26, 2006.

Claims 1-23 and 35-42 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 2, 6-8, 12-17, 23-28, and 47-53 of copending Application No. 10682672 (672). The references and rejection are incorporated herein and as cited in the office action mailed January 26, 2006.

Claims 1-11, 14-20, 22, 23, 35, and 41 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-3, 40, 43, 46, 49, and 50 of copending Application No. 10170964 (964). The references and rejection are incorporated herein and as cited in the office action mailed January 26, 2006.

Response to Arguments

Applicant's arguments have been considered but are moot in view of the new ground(s) of rejection.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kelly Mahafkey whose telephone number is (571) 272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Kelly Mahafkey
Examiner
Art Unit 1761



KEITH HENDRICKS
PRIMARY EXAMINER